***United States Court of Appeals***

***for the Second Circuit***

# APPELLEE'S SUPPLEMENTAL BRIEF

77-7227

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE MUSLIM COMMERCIAL BANK LIMITED,

Plaintiff-Appellee,

v.

M. GOLODETZ & COMPANY and
WATERMAN STEAMSHIP CORP.,

Defendants.

PUBALI BANK, RUPALI BANK, SONALI BANK and ADAMJEE JUTE MILLS, LTD.,

Plaintiffs-Appellants,

v.

M. GOLODETZ & COMPANY and
WATERMAN STEAMSHIP CORP.,

Defendants.

On Appeal From The United States District Court
For The Southern District of New York

# SUPPLEMENTAL BRIEF OF APPELLEE, MUSLIM COMMERCIAL BANK LIMITED

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UNITED STATES COURT OF APPEALS
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THE MUSLIM COMMERCIAL BANK LIMITED, :

Plaintiff-Appellee, :

v. :

M. GOLODETZ & COMPANY and WATERMAN STEAMSHIP CORP., :

Defendants. :

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PUBALI BANK, RUPALI BANK, SONALI BANK and ADAMJEE JUTE MILLS, LTD., :

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SUPPLEMENTAL BRIEF OF APPELLEE,
MUSLIM COMMERCIAL BANK LIMITED

Preliminary Statement

This is an appeal from final judgment entered in the District Court for the Southern District of New York (L. W. Pierce, J.) on the motion of The Muslim Commercial Bank Limited ("Muslim Bank") for summary judgment. A-223, A-237. The appeal was argued before a panel of this Court on October 5, 1977. Counsel for the parties

were subsequently advised by a letter from the Clerk of the Court dated October 21, 1977, that the panel desired further briefing and reargument. The letter stated that the briefs should, "without limitation, deal with" nine specific questions posed by the panel.

This Supplemental Brief is submitted on behalf of Muslim Bank in response to the October 21 letter. First, we consider the questions posed by the panel, and, second, we discuss the appropriate disposition of the case in view of the answers to the panel's questions and the arguments previously made to the Court.

## PART ONE: RESPONSES TO QUESTIONS POSED BY THE PANEL

### QUESTION NO. 1

"Does the Appellee dispute that endorsement of the bills of lading by Adamjee to NBP . . . transferred title to the jute to NBP to the extent of the Bank's security interest? If so, on what grounds?"

A. Answer.

Adamjee did not endorse the bills of lading to NBP. The bills were actually delivered by Adamjee to Muslim Bank, which "endorsed" them to NBP. It is Muslim Bank's position that neither Adamjee's delivery of the bills to Muslim Bank nor the latter's "endorsement" of them to NBP

transferred title to or any interest in the jute.* A principal ground for this conclusion is that the bills of lading were not in negotiable or transferrable form and therefore did not constitute documents of title by which title to the jute could be conveyed. There are a number of additional grounds for this conclusion which depend at least in part upon facts not contained in the record presently before this Court.**

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* It is also Muslim Bank's position that, even if it is assumed arguendo that the bills of lading were at some point in time documents of title, the Bangladeshi Claimants cannot rely upon the act of state doctrine to prevent judicial inquiry into the confiscations upon which their claim rests. See Appellee's Main Brief on Appeal, pp. 23 to 25.

** Even if the bills of lading in question were negotiable in form, which they were not, their transfer from Muslim Bank to NBP by "endorsement" did not transfer title. Bills of lading are not, strictly speaking, negotiable instruments (see note at p. 6, infra); therefore, the rights conveyed even to a bona fide purchaser for value depend upon the status and authority of the transferor. See, e.g., Pease v. Gloahec, The Marie Joseph, 16 Eng. Rep. 210, 215 (P.C. 1866); Gilbert v. Guignon, 27 L.T.R. (n.s.) 733 (Ch. App. 1872); Gurney v. Behrend, 118 Eng. Rep. 1275, 1279 (Q.B. 1854); 35 Halsbury's Laws of England, Shipping and Navigation, pt. 5, § 2, ¶ 505 at 352 (3d ed. 1961) [hereinafter Halsbury's Shipping]; Benjamin, Sale of Goods ¶ 1371 at 695 (Common Law Library ed. 1974).

Although the "endorsement" and physical delivery occurred after December 6, 1971, the definitive date is unlikely to be resolved without a trial. See Rule 9(g) Statement, para. 19 at A-14. Muslim Bank asserts that before the middle of December 1971 it had effectively withdrawn authority from its agents in East Pakistan

[Continued on following page]

B. Discussion.

Certain facts with respect to the bills of lading are clear from the record now before this Court. Both bills of lading stated that Adamjee was the shipper, that the goods were consigned to the order of Muslim Bank,

[Continued from previous page]

to deal directly with transactions involving foreign exchange. Pretrial Order, para. 6(c)(iv) at A-184. Once such authority had been terminated, the bills of lading were no longer effectively transferable to NBP or anyone else by the act of any of Muslim Bank's former agents in East Pakistan. Furthermore, as a matter of law, the agents of Muslim Bank were not empowered to act contrary to the interests of Muslim Bank by an unauthorized transfer of the bills of lading to NBP or anyone else. It is also apparent that in the midst of armed conflict no transferee could possibly have relied in good faith on the authority of the endorser. See Gosselin v. Ontario Bank, 36 Can. S. Ct. 406 (1905) (holding that transferee of bills of lading should have inquired into the title of transferor when questionable circumstances arose; i.e., when the bills of lading identified a third party as consignor and consignee, demonstrating an intent to retain title); Barrow v. Coles, 170 Eng. Rep. 1316 (N.P. 1811) (holding that transferee of a bill of lading should have inquired into the title of transferor; the bill of lading bore a special endorsement which indicated that the goods were deliverable to the transferor only if he accepted and paid a bill of exchange).

Finally, if the endorsement and delivery occurred after actual delivery of the goods to the consignee, then no rights whatsoever were conveyed since, as demonstrated in response to Question No. 2, the bills of lading were exhausted (or spent) by such delivery.

that the consignee was M/S. Consejo Estatal del Azucar, Santo Domingo, Dominican Republic ("CEA")* and that freight was to be payable at destination by M. Golodetz & Company ("Golodetz"). See Stipulation, Exhs. G and H at A-155 to A-158. These bills of lading were drawn pursuant to a contract which provided that delivery was to be f.o.b. East Pakistan for carriage to CEA and that the purchase price was to be paid by Golodetz in New York on sight against delivery of appropriate shipping documents (that is, bills of lading and related documents). Stipulation, para. 8(c) at A-37. Adamjee's delivery of the bills of lading to Muslim Bank was in accordance with arrangements made by Adamjee to finance the production and export of jute. Rule 9(g) Statement, paras. 17 and 18 at A-14.

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* The final form of the bills of lading was agreed to by Adamjee and Golodetz through correspondence between Golodetz and R.E.B. Willcox & Co. (New York) Inc., agent for Adamjee. Stipulation of facts dated March 25, 1975 (the "Stipulation"), para. 8 at A-37. In its letter of July 27, 1971 (Exh. 30 identified in the Pretrial Order, at A-197, but not part of the record on appeal) stating the form of the bill of lading which it required, Golodetz made it clear that the "correct consignee" was CEA and not any Pakistani bank. This letter reads, in part:

> "We attach herewith non-negotiable copy of a bill of lading which shows the consignee in accordance with our instructions. There is also another way to have the bill of lading consigned to the above mentioned consignee, by obtaining an addendum to the bill of lading wherein the steamship company certifies that instead of shown consignee (A Pakistan Bank) the correct consignee should read the name of the consignee as stipulated by us [i.e. CEA]."

Under the law of Pakistan and under the English Common Law, a bill of lading is a contract of carriage and may be a document of title through which the underlying goods may be transferred. See, e.g., Lickbarrow v. Mason (Exhibit D to Appellants' Main Brief on Appeal).* A bill of lading is not, however, a document of title unless the goods described in it are made deliverable to "bearer", to a named consignee or his order or assigns, or simply to "order or assigns."** This principle is well recognized by courts and commentators alike. For example, the Privy Council has stated:

> [T]he general view of the mercantile world has been for some time that, in order to make bills of lading negotiable [hence effective as documents of title], some such words as "or order, or assigns" ought to be in them.

Henderson & Co. v. The Comptoir d'Escompte de Paris, 29 L.R.T. (n.s.) 192 (P.C. 1873) (Hong Kong). And a leading

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* Bills of lading are not, however, negotiable instruments and therefore must be distinguished from notes, bills of exchange and similar documents. See, e.g., Gurney v. Behrend, supra; 35 Halsbury's Shipping, pt. 5, § 2, ¶ 471 at 329-30; M. Islam, Principles of Commercial Law 390 (3d ed. 1967; Dacca); A.G. Chaudhary, Mercantile Law in Pakistan 202 (1966).

** American law similarly distinguishes between negotiable and non-negotiable bills of lading. See, e.g., N.Y.U.C.C. §§ 7-104; 7-303; 7-309 (McKinney 1964).

authority on the English Common Law as recognized on the Indian subcontinent has observed:

> The bill of lading is thus generally a document of title, carrying with it the right to demand and have possession of the goods described in it. But in order that it may have this character, it must purport on the face of it to be transferable--usually by stating that delivery is to be made to the "order or assigns" of the consignee, or of the shipper; and works [sic] of this kind seem to be essential to the transferability.

M. Islam, supra, at 390. Another commentator has stated:

> If the bill of lading makes the goods deliverable to a named person, without adding "or order or assigns," it is not a document of title in the common law sense.

Benjamin, Sale of Goods ¶ 1369 at 693 (Common Law Library ed. 1974) (footnotes omitted).

The transfer of a non-negotiable bill of lading does not transfer title to the goods; such a bill shows on its face that the goods have been sold and transferred apart from the documents. As stated in the leading treatise on English law:

> A person who has already sold the goods apart from the bill of lading cannot afterwards, by dealing with the bill of lading, transfer any property in them to the transferee.

35 Halsbury's Shipping, pt. 5, § 2, ¶ 498, at 349.

It appears both from the face of the bills of lading and from the transaction contemplated by Adamjee and Golodetz that the bills in question here were non-

negotiable and that the jute was sold apart from them. The bills provided that the goods were to be delivered to a named consignee -- CEA -- not to CEA "or order". In other words, the bills on their face clearly instructed the carrier to make delivery to a single designated consignee (CEA) and did not contain provisions permitting Muslim Bank, CEA or anyone else to order that delivery be made to some other consignee. Moreover, it was not contemplated by any party to the sale or the shipment that CEA was to be responsible either for payment of the purchase price of the jute or for the freight for the carriage of the jute. Adamjee and the bank which financed the export transaction were to look only to Golodetz for payment of the purchase price, and the carrier was to look only to Golodetz for payment of the freight.

The contract of sale required Golodetz to pay the purchase price upon presentation of shipping documents, which merely identified for Golodetz the entity to which it was to make payment.* The use of bills of lading drawn to a Pakistani bank, but consigning the jute to the ultimate purchaser, permitted CEA to acquire free and unencumbered

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* Golodetz was, of course, not a party to the bills of lading and had no obligations to Adamjee arising from them.

title to the jute upon delivery and gave the financing bank assurance that it (not Adamjee) would receive payment from Golodetz in New York.

QUESTION NO. 2

> "In light of NBP's holding of the bills of lading, did the delivery of the jute to the consignee in the Dominican Republic on December 17 and 21, 1971 . . . affect the legal position of NBP?"

A. Answer.

It is not clear from the record before this Court whether NBP or Muslim Bank held the bills of lading on December 17 and 21, 1971, see note at p. 3, supra; however, irrespective of whether the bills were held on such dates by Muslim Bank or NBP, they became "spent bills" after delivery of the jute to CEA. Consequently, if it is assumed arguendo that the bills were negotiable upon issue, delivery of the jute to CEA did have an effect upon the legal position of the holder in that after delivery their transfer could not transfer title to the goods. However, if the bills of lading were non-negotiable upon issue as we contend, the delivery to CEA did not affect the legal position of the holder.

B. Discussion.

The facts here show that CEA was the named consignee of the jute and that the purchase price and the freight were payable by Golodetz, not by CEA. See p. 5, supra. CEA's right to claim (and to take delivery of) the jute under the bills of lading was not conditioned upon Golodetz's payment for the jute. Accordingly, Golodetz's failure to pay for the jute prior to its delivery to CEA did not create a defect in CEA's title to the jute. Furthermore, the carrier was directed by the bills of lading to deliver the goods to CEA. Upon such delivery, the carrier discharged its contract of carriage and terminated the bills' role, if indeed they ever had any, as documents of title.

It should be noted that Golodetz did not pay the purchase price prior to (or at least near the time of) delivery only because the holder of the bills of lading (Muslim Bank or NBP) failed, as a result of the rebellion in progress in East Pakistan, Stipulation, para. 19 at A-39, to present the bills of lading in a timely fashion and as contemplated by Golodetz's agreement with Adamjee. Stipulation, para. 15(b) at A-38; Rule 9(g) Statement, paras. 15 and 16 at A-13. Golodetz did not repudiate its obligation to pay for the jute and in fact placed the pur-

chase price in escrow pending the outcome of this litigation. Stipulation, paras. 15(b) and 15(c) at A-38.

Common law authorities recognize the power of the holder of a document of title to deal in the underlying goods during a period in which the goods are in transit (while physical possession cannot be delivered) and before they have been delivered to any person having a right to claim them. See, e.g., Barclay's Bank, Ltd. v. Comm'rs of Customs & Excise, [1963] 1 Lloyd's List L.R. 81, 89-90, (Q.B.), quoting from Sanders Brothers v. Maclean & Co., [1883] L.R. 11 Q.B. 327, 341. See also 34 Halsbury's Laws of England, Sale of Goods, pt. 7, § 4, ¶¶ 309 & 311 at 179 & 180 (3d ed. 1961). As one text writer has observed, however, an endorsement of a bill of lading passes no property or title to the endorsee "[w]here at the time of the endorsement the shipowner has already delivered the goods to a person entitled to have them delivered to him." Scrutton, Charter Parties and Bills of Lading art. 75 at 197 (17th ed. 1964). Similarly, Payne, Carriage of Goods by Sea 66-67 (8th ed. 1968), states:

> The common law gave effect to the mercantile usage whereby endorsement and delivery of a bill of lading during the transit gave to the endorsee such property in the goods as it was the intention of the parties

> to transfer. In order that the property in the goods may pass by assignment of the bill of lading, the following conditions must be complied with:
> . . .
> (2) The goods must be in transit . . . . They need not be at sea, but they must have been handed over to the shipowner or forwarding agent for carriage and not yet delivered to any person having the right to claim them under a bill of lading.

See 35 Halsbury's Shipping, pt. 5, § 5, ¶ 638 at 450.

Several cases and authorities deal specifically with the effect of delivery of the goods upon the rights of the holder of a bill of lading.

> In the normal case, the bill of lading retains [the] quality of transferability until the contract of carriage . . . is performed. . . . The bill of lading ceases to be a document of title once the goods have been delivered to the person entitled under it to possession of the goods.

Benjamin, Sale of Goods ¶ 1369 at 694 (1974). A.G. Chaudhary, in his treatise on commercial law in Pakistan, has stated:

> The peculiarity of the bill of lading is that it is not only a document containing terms of a contract of carriage, but is also a document of title to the goods, and remains so till the goods have come into the hands of a person entitled under the bill of lading to the possession of them.

A.G. Chaudhary, Mercantile Law in Pakistan 202 (1966) (emphasis supplied).

Several English and Commonwealth cases have considered the question whether a bill of lading is spent

or exhausted by the delivery of the goods. In Barber v. Meyerstein, [1870] L.R. 4 H.L. 317, the House of Lords held that in order to discharge a contract of carriage and to terminate a bill of lading the carrier must surrender actual possession of the goods to a person entitled to receive them. There it was decided that an assignment of a bill of lading while goods were held by the carrier and available for delivery to the consignee, subject only to collection of freight charges, effectively conveyed title to the goods. Until the consignee paid the freight charges and actually took physical possession of the goods, the contract of carriage was not discharged, and the bills remained effective documents of title. The same conclusion was reached in Barclay's Bank, Ltd. v. Comm'r of Customs and Excise, [1963] 1 Lloyd's List L.R. 81, 89 (Q.B.), in which the court observed:

> [A] contract [for the carriage of goods by sea] is not discharged by performance until the shipowner has actually surrendered possession (that is, has divested himself of all powers to control any physical dealing in the goods) to the person entitled under the terms of the contract to obtain possession of them.

Accord, Hayman & Sons v. M'Lintock, [1907] Sess. Cas. 936 (Scot.).

It is undisputed that CEA took actual possession of the jute not later than December 21, 1971. See Stipula-

tion, paras. 11 and 13 at A-38. The only issue remaining, therefore, is whether CEA was entitled under the bills of lading to claim the jute. In considering this issue it should be noted first that the bills show on their face that CEA alone was the final consignee and contain no provision for the designation of another final consignee. Therefore, the only way in which the carrier could fulfill its contract of carriage was to deliver the jute, as it did, to CEA.

We have found only two cases which appear relevant to this remaining issue; they both support the conclusion that CEA was entitled to obtain possession of the jute from Waterman. In the first case, it was held that delivery to a consignee which was obliged to pay the purchase price of the goods prior to obtaining possession of them did not discharge the contract of carriage because such payment was not actually made. London Joint Stock Bank v. British Amsterdam Maritime Agency, 104 L.T.R. (n.s.) 143 (K.B. 1910). In the second case the consignee, as is true of CEA in the instant case, was not required to pay for the goods before taking delivery; therefore, his obtaining possession of the goods effectively terminated the contract of carriage and exhausted the bill of lading as a document of title. Madras & S.M. Ry. v. Haridoss Banmalidoss, [1918] I.L.R. 41 Madras 871 (App. Civ.). In Madras & S.M. Ry., goods

were shipped under a railway receipt (which is analagous to a bill of lading) with the same party appearing as consignor and consignee. In accordance with the usual practice, the goods were delivered to and claimed by the purchaser without surrender to the carrier of the railway receipt. The purchaser subsequently paid the bank to which the receipt had been endorsed by the consignee and acquired the railway receipt which it was then to surrender to the railway company; however, instead of surrendering the receipt to the railway company, the purchaser negotiated it to a third party. The court held that the contract of carriage had been completed by delivery of the goods to the purchaser and thus that the third party did not acquire any rights in the goods upon negotiation of the receipt to it.

Accordingly, even if it is assumed that the bills of lading were negotiable upon issue, the banks, as holders of the bills, had no basis for a claim to the jute itself once it had been delivered. They had only a claim against Golodetz for the purchase price.* The

* Furthermore, the holders (and their purported successors by confiscation) would appear to be equitably estopped from asserting a claim of title to the jute based upon their own failure (or inability) to present the bills of lading to Golodetz in advance of the contemplated date of delivery of the jute to CEA.

[Continued on following page]

delivery of the jute to CEA in the Dominican Republic and the consequent exhaustion of the bills of lading occurred long before the enactment by Bangladesh of any confiscatory legislation; by the time such legislation was enacted, the jute was thousands of miles from Bangladesh, and the bills of lading in Bangladesh did not represent an interest in the jute which could be transferred or which could be seized by the Government of Bangladesh.

QUESTION NO. 3

> "Is the armed clash in East Pakistan described in items 19 and 20 of the Stipulation of Facts . . . properly characterized as a rebellion or as a war? Does such characterization make any difference with respect to the question whether the Administration Order or the Abandoned Property Order or the Nationalisation Order . . . constituted violations of international law?"

A. Answer.

The armed clash in East Pakistan began as an insurrection and ultimately became a rebellion. It is doubtful that there ever was, as a matter of international

[Continued from previous page]

> Under the Uniform Commercial Code the seller (or his successor) has an obligation to obtain and promptly tender any shipping document necessary to enable the buyer to obtain possession of the goods. N.Y.U.C.C. §§ 2-503(3) ("destination" contracts); 2-504(b) ("shipment" or f.o.b. contracts) (McKinney 1964). If the obligation is not fulfilled, the seller has not made a valid tender of delivery. N.Y.U.C.C. §§ 2-503(2) & (3); 2-504, comment 1 (McKinney 1964).

law, a state of war between the Islamic Republic of Pakistan and the People's Republic of Bangladesh. The only war in the international law sense was that between Pakistan and India, which began around December 3, 1971. None of the alternative characterizations of the armed clash, however, saves the confiscatory acts of Bangladesh from being contrary to international law and the strong public policy of the United States.

B. Discussion.

War is defined in international law as "a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases." 2 L. Oppenheim, International Law § 54 at 202 (7th ed. H. Lauterpacht 1952); cf. 7 J.B. Moore, A Digest of International Law § 1100 at 153-54 (1906). For purposes of the present analysis, war is to be distinguished from three different states or stages of armed conflict: insurrection, rebellion and civil war. Insurrection has been characterized as "the rising of people in arms against their government . . . ." 7 J.B. Moore, supra, § 1103 at 159. And rebellion has been described as a "war between the legitimate government of a country and portions . . . of the same

who seek to throw off their allegiance to it and set up a government of their own." 7 J.B. Moore, supra, § 1103 at 159. The distinction between insurrection and rebellion is not, however, precise. Jessup, The Spanish Rebellion and International Law, 15 Foreign Aff. 260, 270 (1937). The state of civil war has been defined in the following manner:

> [W]ar between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government.

7 J.B. Moore, supra, § 1103 at 159; cf. The Prize Cases, 67 U.S. (2 Black) 635, 666 (1862).

With the definitions of insurrection, rebellion and civil war given above in mind, it seems appropriate to describe the armed clash as beginning in an insurrection and progressing to a rebellion and possibly to a civil war.* The armed clash could, however, not have become a war between Pakistan and Bangladesh until Bangladesh, as a matter of international law, achieved the status of a State or was recognized as a belligerent power. 2 L. Oppenheim, supra, § 59 at 209. There is no evidence that Bangladesh was

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* It may never have, in fact, progressed to a civil war because the Bangladeshi faction was never "contending for the mastery of the whole" State. 7 J.B. Moore, supra. But see 2 L. Oppenheim, supra, § 59 at 209.

ever recognized as a belligerent power. In addition, Bangladesh could not have become a State until it obtained control over a substantial part of the territory and population of East Pakistan and showed reasonable promise that it would succeed in displacing the Pakistani Government in that territory. See Restatement (Second) of the Foreign Relations Law of the United States § 101 (1965) [hereinafter cited as Restatement].

The parties here have not agreed as to any date on which Bangladesh became a State. On May 23, 1972, Bangladesh purported to proclaim itself a free and sovereign State as of March 26, 1971. Stipulation, para. 18 at A-39 and Exhibit I at A-159 to A-161. The stipulated facts show, however, that as a matter of international law Bangladesh could not reasonably be viewed as a State until much later in 1971 and perhaps until substantially after the cessation of hostilities:

> 19. During the period March 26, 1971 through December 3, 1971, there was Bengali guerrilla activity against the Pakistani army in East Pakistan. On December 3, 1971 a full-scale war commenced in East Pakistan with Bengali rebels being supported by regular Indian troops. The City of Dacca was entered by and fell to Indian and Bengali troops on December 14, 1971. Prior to December 16, 1971, Pakistan claimed to have both de facto and de jure control over East Pakistan.
>
> 20. On December 16, 1971, the Commander of Pakistan troops in East Pakistan surrendered to Indian and Bangladesh forces in East Pakistan.

Stipulation, paras. 19 and 20 at A-39 to A-40. In view of the above and Indian occupation (and probably de facto control) of East Pakistan until March 12, 1972,* it appears that the Bangladesh rebellion terminated at about the time that hostilities ceased and that no state of war ever came into being between Pakistan and Bangladesh.

Thus, there are a number of possible characterizations of the juridical situation existing at the time of the issuance of the Administration Order (December 29, 1971), the Abandoned Property Order (February 28, 1972), and the Nationalisation Order (March 26,1972). Stipulation, paras. 2(a), 21(a) and 22(a) at A-28 and A-40; Stipulation, Exhibits B, J and K at A-54, A-162 and A-164. First, one or more of these orders may have been issued at a time prior to the commencement of the existence of the State of Bangladesh. Any taking accomplished by an

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* See Department of State Press Release No. 79 (April 4, 1972), 66 Dep't State Bull. 597; Recognition of Bangladesh, S. Rep. No. 694, 92nd Cong., 1st Sess. (1972) (Committee on Foreign Relations), accompanying S. Con. Res. 55, 92nd Cong., 1st Sess. (1972), 118 Cong. Rec. 9220 (1972).

In determining whether to extend recognition to a government, the United States has considered, among other criteria, "the existence or nonexistence of evidence of foreign intervention in the establishment of a new regime. . . ." 2 M. Whiteman, Digest of International Law § 4 at 73 (1963).

order issued during such period would (in the absence of any retroactive effect of subsequent recognition, see pp. 27 to 28, infra) be nothing more than the exercise of physical power by an entity not recognized as a State in international law, or by the law of the United States. As such, the taking would constitute not an act of state but only a forcible seizure by private persons and would clearly be contrary to the public policy of the United States. Cf. The Ambrose Light, 25 F. 408 (S.D.N.Y. 1885) (holding that the issue of whether a naval expedition was piratical or lawful under international law depended on whether the U.S. had recognized the existence of a state of war or belligerency).

The second possibility is that one or more of the orders in question were issued after Bangladesh became a State. If that is true, any taking relevant to this case accomplished by any of the orders in question was a taking of property from an alien. If the taking was accomplished in time of war between Bangladesh and Pakistan, it was the taking of property of an enemy alien. It has been stipulated by the parties that neither the Government of Bangladesh nor any agency or department of Bangladesh has paid or offered to pay Muslim Bank or NBP any compensation with respect to the subject matter of this

litigation. Stipulation, para. 23 at A-40 to A-41. As will be further discussed in connection with the answer to Question No. 7, this situation has not changed since the date of the Stipulation. See pp. 29 to 31, infra.

It is clearly established in international law that a State may not take the property of an alien without the payment of prompt, adequate and effective compensation. See 22 U.S.C. § 2370(e)(1) (the "Hickenlooper Amendment"); 8 M. Whiteman, supra, § 25 at 1020, § 30 at 1093, § 33 at 1164; 2 D. O'Connell, International Law 783 (2d ed. 1970); Restatement §§ 185-90. Private property of enemy aliens may not be confiscated in time of war. Borchard, Enemy Private Property, 18 Am. J. Int'l L. 523 (1924). There may be a limited exception which applies to war materiel. In 10 M. Whiteman, supra, § 10 at 683, this exception is stated:

> . . . As international law has developed, efforts have been made to set limits to the right of belligerents in war to capture property belonging to the enemy or to the enemy's subjects. . . . [T]he rule soon developed (even though it was not always observed) that it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting), while it remained the law of nations that captures at sea by naval forces were authorized.

Accordingly, the Bangladesh confiscation is violative of one principle of international law whether it

occurred in time of war or in time of peace. If the confiscation did not occur in time of war, there is an additional reason why it violated international law. Under established principles of international law, if a State nationalizes the property of an alien, it must not only pay prompt, adequate and effective compensation, but the act of nationalization must also be non-discriminatory. Nationalizations, to be recognized as legal under established principles of international law, must be impersonal and general in character and not for purposes of political reprisals. See Restatement § 166, Comment a, Illustration 2; 2 D. O'Connell, supra, at 780. It is clear that the Administration Order, the Abandoned Property Order and the Nationalisation Order were not general and impersonal; on the contrary, they were directed at aliens of Pakistani nationality. Thus, the Abandoned Property Order applies by its terms principally to property owned by non-resident Pakistani aliens* but does not include the property of all non-resident aliens. Abandoned Property Order, Art.

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* Pakistan is the only State of which it could be said that it was "at any time after the 25th day of March, 1971, . . . at war with or engaged in military operations against the People's Republic of Bangladesh". Abandoned Property Order, art. 2(1)(i), Stipulation, Exhibit K at A-164.

2, Stipulation, Exhibit K, at A-164 to A-165. The Nationalisation Order applies only to the banks set forth in the Schedule which is part of that Order and does not include all non-Bangladeshi banks operating in Bangladesh but only Pakistani banks which operated in Bangladesh. Stipulation, Exhibit B, at A-64. The Administration Order applies only to banks having their head offices in the western provinces of Pakistan. Administration Order, Art. 2, Stipulation, Exhibit J, at A-163.

QUESTION NO. 4

"If Pakistan and Bangladesh were at war, how long--given the cessation of combat on December 16, 1971--did the state of war continue?"

A. Answer.

As has been indicated in the answer to Question No. 3, the armed clash in East Pakistan culminated in a successful rebellion, but there was never a war in the international law sense between Pakistan and the new State of Bangladesh. However, assuming arguendo that a state of war did at some point in time exist between Pakistan and Bangladesh, such state of war did not continue beyond the cessation of combat on December 16, 1977.

B. Discussion.

The Bangladeshi rebels sought to set up a govern-

ment of their own controlling the territory which had formerly been the Eastern Province of Pakistan. There were no common boundaries between the western provinces of Pakistan and the Eastern Province, which were separated by India. The Bangladeshi rebels at no time sought to extend the armed clash to the territory of the western provinces. They, with the help of the Indian army, defeated the Pakistani army, which surrendered on December 16, 1971. After December 16, there were no military operations by Pakistan against the Bangladeshis, and none by the Bangladeshis against Pakistan. Thus, the armed clash in East Pakistan terminated before (or at the time) Bangladesh became a State in the international law sense.

However, even if it were assumed that Bangladesh became a State prior to December 16, 1971, so that there might have been a state of war between Pakistan and Bangladesh, that war ended with the cessation of combat. Although a state of war between nations ordinarily ends either through a treaty of peace or through the subjugation of one belligerent by the other, a war may also end simply with the abstention by the former belligerents from further acts of war. See 2 L. Oppenheim, supra, § 261 at 596. There are a number of historic examples of wars

between States terminating in this manner:

> [C]ases have occurred in which simple cessation of all acts of war on the part of both belligerents has actually and informally brought the war to an end. Thus ended in 1716 the war between Sweden and Poland, in 1720 the war between Spain and France, in 1801 the war between Russia and Persia, in 1867 the war between France and Mexico, and in the same year the war between Spain and Chile.

2 L. Oppenheim, supra, § 262 at 597. It would appear that the principle of termination of war through cessation of acts of war would apply here -- the Bangladeshi had achieved their objective and the Pakistani forces in the Eastern Province had surrendered. Moreover, the presence of India as a buffer State assured that hostilities would not recommence between the western provinces of Pakistan and Bangladesh.

QUESTION NO. 5

> "What action, if any, has been taken by Pakistan with respect to property in Pakistan owned by citizens of what has become Bangladesh?"

A. Answer.

Pakistan has vested property owned by residents of the territory that has become Bangladesh in a custodian. Abandoned Properties (Taking Over And Management) Act 1975 (P.L.D. 1975 at 110); Abandoned Properties (Taking Over

And Management) (Amended) Act 1976 (P.L.D. 1976 at 372). Copies of this legislation are reproduced in the Addendum to this Supplemental Brief as Exhibits A-1 and A-2.

B. Discussion.

Any action by Pakistan with respect to property in Pakistan owned by citizens of what has become Bangladesh is not relevant to the case now before this Court. As is stated in our answer to Question No. 8, Muslim Bank is not aware of any pending negotiations between Bangladesh and Pakistan for the settlements of any claims of the nature specified in that question. It should also be noted that there is no authority for the proposition that the application of the act of state doctrine to acts of one State with respect to citizens of a second State is affected in any manner by acts which such second State may have taken with respect to citizens of the first State.

QUESTION NO. 6

"Does the United States' recognition of Bangladesh on April 4, 1972 or Pakistan's recognition of Bangladesh . . . have any bearing on the rights of the parties? . . ."

A. Answer.

The recognition of Bangladesh by the United States and by Pakistan has no ultimate bearing on the rights of

the parties. The recognition by the United States makes it possible for the Bangladeshi Claimants to argue that the confiscatory acts of Bangladesh are not subject to examination by this Court for conformity with international law or the law and policy of the United States because they are protected by the act of state doctrine. However, as has been demonstrated in Muslim Bank's Main Brief on Appeal and as will be further discussed in Part Two of this Supplemental Brief, the act of state doctrine does not apply in the present context.

B. Discussion.

The effect under United States law of the recognition of Bangladesh on April 4, 1972, was to confer on Bangladesh the status of a State. A collateral effect of recognition of the new State is that its acts (even those occurring prior to recognition) may be shielded from examination by courts of the United States by the act of state doctrine so long as they were completed within the new State's territory. See Oetjen v. Central Leather Co., 246 U.S. 297, 302-03 (1918); Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918). However, the act of state doctrine may not be used affirmatively, as the Bangladeshi Claimants attempt to do in the present

case, to protect from judicial inquiry governmental acts which were not completed and brought to fruition within the territory of Bangladesh. See, e.g., Underhill v. Hernandez, 168 U.S. 250, 252 (1897); Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966); Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), cert. denied, 393 U.S. 924 (1968).

Pakistan's recognition of Bangladesh in 1974 does not appear relevant to the decision of this case. It certainly did not carry with it an acknowledgement by Pakistan of the validity of Bangladesh's seizures of property of Pakistani citizens in Bangladesh and elsewhere.

QUESTION NO. 7

> "What is the effect of Article 8 of the Nationalisation Order quoted in item 23 of the stipulation of facts on the issue of confiscation? Have there been any developments with respect to compensation since the date of the stipulation and the statement under Rule 9(g) . . . ?"

A. Answer.

Article 8 of the Nationalisation Order reinforces the conclusion that the Bangladeshi takings at

issue here are confiscatory and contrary both to international law and United States public policy. Article 8 does not provide for the payment of any compensation for the purported takings from Muslim Bank or NBP. There have not been any developments subsequent to the date of the stipulation and the statement under Rule 9(g) which alter the conclusion that the Bangladeshi takings are confiscatory.

B. Discussion.

The Abandoned Property Order of February 28, 1972, vested in the Government of Bangladesh the interests, if any, of Muslim Bank and NBP in the jute and their rights to be paid by Golodetz. Article 8(1) of the Nationalisation Order of March 26, 1972, provided for compensation only with respect to the acquisition by the Government of such portion of a bank's undertaking "not already vested in Government [of Bangladesh] by or under any law . . . ." Stipulation, Exhibit B at A-56. Since the interests of the banks in the jute sale had been vested in the Government by the Abandoned Property Order before the promulgation on March 26, 1972 of the Nationalisation Order, no compensation whatsoever would be payable under the Nationalisation Order with respect to such interests. The parties have stipulated that no compensation has in fact been paid. Stipulation, para. 23 at A-40 to A-41.

Moreover, although the record does not contain information on the scope or the value of property in East Pakistan owned by NBP and Muslim Bank which was confiscated by Bangladesh, it is indisputable that the value of such property far exceeded the value of the paid-in capital of the banks. The limitation on compensation under the Nationalisation Order to the amount of paid-in capital of the bank would make any available compensation inadequate. See p. 22, supra.

We have been advised by Muslim Bank that some claims prosecuted in the courts of Bangladesh under article 8 of the Nationalisation Order resulted in judgments for the claimants, but that the judgments were nullified by subsequent legislation.

QUESTION NO. 8

"Are there any pending negotiations between Pakistan and Bangladesh for the settlement of claims such as those here in suit or arising out of such acts of Pakistan as are described in item (5) above?"

Answer and Discussion.

We have been advised by the Muslim Bank that it is not aware of any pending negotiations between Bangladesh and Pakistan for the settlement of claims such

as those here in suit or such as those described in Question No. 5. Thus, Muslim Bank is unaware of any State-to-State negotiations which are concerned with the claims involved in this appeal or which might provide a vehicle for the resolution of such claims.

QUESTION NO. 9

"Would it be proper and, if so, appropriate for the court of appeals to vacate the order of the district court without prejudice and direct the district court to suspend judgment for a reasonable time to allow for negotiations such as are described in item (5) above?"

A. Answer.

We do not believe that it would be appropriate for this Court to direct the district court to suspend its judgment pending negotiations between the governments of Pakistan and Bangladesh.

B. Discussion.

There are no ongoing negotiations between the governments of Pakistan and Bangladesh. Muslim Bank has not been asked to consent, and has not consented, to submit its claim to the funds held in escrow to any process of international negotiations. Without the consent of all parties to this litigation, and certainly in the ab-

sence of pre-existing negotiations between the States, it would be both futile and inappropriate for this Court to require such a submission.

Chief Justice Marshall's observations in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), are apt in this context:

> It is most true, that this court will not take jurisdiction if it should not; it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

The courts have gone to pains to point out that the act of state doctrine itself is not a doctrine which requires an American court not to assume jurisdiction at all; it is rather a doctrine which is, in certain circumstances, available as a defense to protect acts of state from examination in the light of the public policy of the forum and the requirements of international law. In Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918), the Supreme Court said that the act of state doctrine

> does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the

> merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.

The doctrine is nothing more than a defense which is sometimes available as an exception to the usual rule that the courts should decide cases on the basis of applicable law, including the law of the forum and international law. See First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763, rehearing denied, 409 U.S. 897 (1972).

When the doctrine is applied, the injured party may sometimes be able to vindicate his rights in the courts of the acting state or through the process of international negotiations. Ricaud, supra, 246 U.S. at 310. It would, however, be anomalous in the extreme for this Court to create a new rule for cases in which the act of state doctrine is not applicable under which a court might refrain from exercising its jurisdiction and thus, as a practical matter, give the same insulation against the public policy of the forum and the requirements of international law that would have been given if the act of state doctrine had been applicable.

Neither the law nor the facts of this case are served by such a result. There are no litigations pend-

ing elsewhere involving the parties and the issues at bar. Cf. Clark, Code Pleading 505, 603 (2d ed. 1947) (availability of plea of abatement restricted to situations in which issues and parties are identical). This forum is not inconvenient and may in fact be the only reasonably available forum in which the parties may resolve their dispute. Compare Crosley Corp. v. Westinghouse Elec. & Mfg. Co., 130 F.2d 474, 475 (3d Cir.), cert. denied, 317 U.S. 681 (1942) (stay appropriate where action pending in another forum might afford more complete and expeditious relief), with McClellan v. Carland, 217 U.S. 268 (1919) (improper to stay pending action to permit institution of second action in another forum). The machinery of the resolution of the dispute on a governmental level is not in place. Even if it were, this Court's referring this case to the political process would be nothing less than a retreat by it from the desideratum of assuring the application of the "rule of law" in relations between States and aliens.

For all of the foregoing reasons, this Court should decide the case before it under principles of international law and the law and public policy of the United States; in so doing, it must deny effect to Bangladesh's confiscatory decrees.

## PART TWO: GENERAL DISCUSSION

The matter which this Court now has before it started as two separate actions. One was brought by Muslim Bank* against Golodetz and Waterman Steamship Corporation ("Waterman"), and the other was brought by the Bangladeshi Claimants against the same defendants. The former action was commenced in December 1971, and the latter in February 1972.** Both actions sought damages equivalent to the purchase price of the jute sold by Adamjee to Golodetz for delivery to CEA. None of the plaintiffs in these separate actions sought to bring an action in the Dominican Republic to secure possession of or title to the jute, and no attempt was made to bring an actior against CEA for damages or to join CEA as a party to the actions commenced in the Southern District of New York. By order entered April 4, 1973, the two separate actions were consolidated.

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* Muslim has taken an assignment from the National Bank of Pakistan ("NBP") of any right, title or interest it may have in or to the subject matter of this litigation and thus is the sole Pakistani claimant. Stipulation, para. 7(1) at A-36.

** The Bangladeshi Claimants' action, to the extent that it was predicated upon the bills of lading issued by Waterman to Adamjee, is barred by 46 U.S.C. § 1303(6) since it was not commenced within one year of delivery.

On March 13, 1975, an order and stipulation were filed in the consolidated actions pursuant to which (a) Golodetz and Waterman were eliminated as defendants, (b) Golodetz placed in escrow a sum of money representing the agreed purchase price of the jute (converted from pounds sterling to dollars) plus interest accrued at the rate of 7-1/2 percent per annum from January 1, 1974 to the date the escrow was established and (c) Muslim Bank and the Bangladeshi Claimants agreed that the United States District Court for the Southern District of New York should retain jurisdiction for the determination of their respective rights in and to the sum held in escrow. Supplemental Appendix at 24 to 29.

The rights of the respective claimants to the escrowed purchase price depend, not upon claims which they have against each other, but rather upon the claims which they originally asserted in different lawsuits against Golodetz. Thus, the Bangladeshi Claimants contend in the pretrial order signed by their counsel that they are entitled to judgment for a number of reasons, including:

> (r) That the location of the Bills of Lading in Bangladesh, located the claims against Golodetz and Waterman, which are the subject matters of this consolidated action in Bangladesh for purposes of the Act of State Doctrine.

Pretrial Order para. 7(r) at A-191. In the Pretrial Order the Bangladeshi Claimants also characterized their claim

against Golodetz as "an intangible claim" (rather than a right to property) and asserted that as a consequence the Hickenlooper Amendment did not apply to bar application of the act of state doctrine. Pretrial Order para. 7(y) at A-193. Apparently realizing after the decision of this Court in United Bank Limited v. Cosmic Int'l, Inc., 542 F.2d 868 (2d Cir. 1976), that a claim so based would not be protected by the act of state doctrine, the Bangladeshi Claimants changed their approach and contended that there was an actual taking of property (through the taking of bills of lading) within the territorial limits of Bangladesh. By so doing, however, they have again placed their claim within the ambit of the Hickenlooper Amendment, which applies to claims of title to or interest in property. See discussion at pp. 43 to 46, infra.

Muslim Bank contends that the act of state doctrine is not available as a shield in the action by the Bangladeshi Claimants against Golodetz to prevent the application of international law and American public policy with respect to the confiscations upon which those Claimants rely. Muslim Bank argued in its Main Brief on Appeal and on oral argument that this result followed because the confiscations were not completed within the territory of Bangladesh because it was necessary for the Bangladeshi Claimants to seek the aid of the courts of the United

States in order to give any practical effect at all to them.

We believe that this appeal can be disposed of solely on the grounds argued initially before this Court. However, in the light of the questions posed by the panel in the letter of October 21, 1977, a more extended discussion of some of the underlying issues raised by the Court's questions is in order. Accordingly, the remaining portion of this Supplemental Brief will be comprised of the following:

1. A recapitulation of Muslim Bank's basic position;

2. A discussion of the application of the Hickenlooper Amendment to this case; and

3. A discussion of why this case should be decided on the merits at this time.

## I. Recapitulation of Basic Position.

The Bangladeshi Claimants' case against Golodetz, upon which any right they may have to the escrowed purchase price depends, is ultimately founded upon the taking by Bangladesh of rights of Muslim Bank or NBP; in other words, the Bangladeshi Claimants assert that they now stand in the shoes of the Pakistani banks and are legally entitled to claim the debt of Golodetz to Adamjee which was assigned

by Adamjee to one of the Pakistani banks as security in connection with the financing of the export of the jute.

It has been stipulated by the Bangladeshi Claimants that that taking was without payment of any compensation, much less payment of prompt, adequate and effective compensation. Stipulation paras. 22 to 23 at A-40 to A-41. Moreover, as is shown at pp. 21 to 22, supra of this Supplemental Brief, the taking was discriminatory in that the actions upon which the Bangladeshi Claimants must rely were directed not against aliens generally but only against those of Pakistani nationality. Such confiscatory action by a State is clearly contrary to the public policy of the United States and, as is shown at pp. 23 to 24 supra, is also contrary to well established principles of international law.

The fact that the takings may have occurred during a time of war has been demonstrated to be irrelevant. Wartime actions directed against private citizens are subject to the usual prohibition under international law of takings without compensation. See p. 22, supra. Likewise, there is no wartime exception to our national abhorrence of confiscations. In United Bank Limited v. Cosmic Int'l, Inc., 542 F.2d 868 (2d Cir. 1976), this Court observed that there was no domestic legislation or case law which

> suggest[ed] even remotely that confiscatory seizures of an extraterritorial nature can

> ever be consistent with American public policy.
>
> It would hardly be "consistent" with American public policy to create a special exception for extraterritorial seizures committed in wartime.

542 F.2d at 887 (footnote omitted) (emphasis in original). The fact that takings during wartime may be discriminatory without violating international law does not alter the result here.*

The Bangladeshi Claimants contend, however, that the actions of Bangladesh upon which they rely are shielded from examination by the courts of the United States by the act of state doctrine. Muslim Bank, on the other hand, contends that that doctrine does not apply here because the confiscation was not completed within the territory of Bangladesh.

This Circuit, beginning with Republic of Iraq, supra, has taken a pragmatic approach to the application of the act of state doctrine and has established beyond challenge the proposition that an act of state does not take place within the territory of a state unless its practical consequences come to fruition within that territory. It

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* See p. 23, supra. Serious questions, have, in addition, been raised as to whether the takings occurred during wartime and, for that matter, whether there even was a "war". See pp. 18 to 20, supra.

is not enough for purposes of the act of state doctrine that the seizure should take place de jure within the territory of the foreign state; it must also take place de facto within that jurisdiction. See Hunt v. Mobil Oil Corp., 550 F.2d 68, 74 (2d Cir.), cert. denied, 46 U.S.L.W. 3366 (U.S. 1977). Accordingly, United States public policy must be applied to the Bangladeshi claim against Golodetz, and that claim must fail.

This practical approach, embodied in the fait accompli concept, bars the Bangladeshi claims that are premised on contract. If those claims are contractual in nature, the present case falls squarely within the principle announced in Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), and applied in the United Bank Limited, supra, in a context virtually identical to that at bar.

In our Main Brief on Appeal, we also argued that the fait accompli concept applies equally to defeat any Bangladeshi claim based on title to the jute through confiscation of the bills of lading since, as a practical matter, the Bangladeshi Claimants' possession of the bills of lading gave, under the circumstances, nothing more than a predicate for a lawsuit against Golodetz and Waterman.

This conclusion is buttressed by the analysis of the commercial law of Pakistan with respect to bills of lading which has been undertaken in response to the first two questions posed by the panel. There we demonstrated that the bills of lading were never "documents of title" which might have given to their possessor the right or power to deal with the jute. And even if they were assumed, arguendo, to have been documents of title when issued, they lost their character as such once the jute had been delivered to CEA; thereafter, transfer of the bills could not affect title to the jute. See pp. 2 to 16, supra. Therefore, the most that Bangladesh could have seized within its territory was the obligation of Golodetz to pay the purchase price for the jute. Such a seizure is not, of course, a fait accompli because that claim must be enforced against the foreign debtor -- Golodetz. Thus, the instant case is clearly within the fait accompli concept, and the shield of the act of state doctrine is not available to the Bangladeshi Claimants.

## II. Applicability of the Hickenlooper Amendment to this Appeal.

In the penultimate paragraph of the October 21 letter, reference is made to the Hickenlooper Amendment.

Originally, the Bangladeshi Claimants attempted to avoid the consequences of that Amendment by asserting their claim is "an intangible claim". See pp. 37 to 38, supra. If they now assert, as they appear to do, that Bangladesh took title to the jute by seizing the bills of lading, their case against Golodetz is based upon assertion of "a claim of title or other right to property" and falls within the ambit of the Hickenlooper Amendment, which provides in part:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable . . . (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

22 U.S.C. § 2370(e)(2).

It has been demonstrated that the confiscation by Bangladesh constitutes a violation of the principles of international law. Therefore, since the President has not determined that the application of the act of state doctrine is required here, this Court, if it concludes that the Bangladeshi taking constituted a taking of title to the

jute, cannot decline in this case, on the ground of that doctrine, to make a determination on the merits giving effect to the principles of international law. Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956, rehearing denied, 390 U.S. 1037 (1968). Golodetz, a New York limited partnership, Stipulation, para. 5(a) at A-30, is within the scope of the protection afforded by the Amendment against the claim of the Bangladeshi Claimants. See Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394, 402 (2d Cir. 1970), vacated and remanded, 400 U.S. 1019 (1971).

The cases which construe the Hickenlooper Amendment lead to the conclusion, if this Court decides that Bangladesh confiscated the right to be paid the purchase price of the jute by Golodetz, that this Court must also hold that Bangladesh confiscated an intangible claim to which the Hickenlooper Amendment does not apply. See, e.g., Banco Nacional de Cuba v. First National City Bank, supra; Occidental of UMM Al Qaywayn, Inc. v. Cities Service Oil Co., 396 F.Supp. 461 (W.D. La. 1975); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704 (1968). If this Court so holds, the judgment below must be affirmed because the Bangladeshi confiscation could not have been completed within the territory of Bangladesh (in other words, the confiscation was not

a fait accompli within Bangladesh, entitled to respect under the act of state doctrine).

On the other hand, however, if this Court decides that Bangladesh confiscated property (that is the jute), the instant case is well within the ambit of the Amendment and the confiscation will be subject to examination on the merits, even if it were consummated wholly within the territory of Bangladesh. Under this hypothesis, the Bangladeshi Claimants are asserting against Golodetz a claim to the proceeds of the sale of property based upon a confiscation in violation of the principles of international law. The Amendment requires this Court to refuse to "decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect [here] to the principles of international law."

## III. A Decision on the Merits is Appropriate

These consolidated actions clearly fall within the subject matter jurisdiction of the district court and should be decided in accordance with applicable law. See, e.g., First National City Bank v. Banco Nacional de Cuba, supra, 406 U.S. at 763. We have discussed in response to question No. 9 the reasons why this Court should decide these consolidated actions on the basis of international

law and U.S. public policy and why it should not consider a stay or abatement of the actions pending submission of the claims to negotiations between the States of Pakistan and Bangladesh. There are no negotiations in progress in which the claims might be considered; furthermore, Muslim Bank and the Bangladeshi Claimants have subjected themselves to the jurisdiction of this Court and requested a determination on the merits. Finally, a ruling on the merits will advance the cause for the application of international law to dealings between states and aliens.

## CONCLUSION

The claim which the Bangladeshi Claimants assert against Golodetz for the purchase price of the jute ultimately turns upon the issue whether they have lawfully succeeded to the rights of Muslim Bank or NBP. Since it appears beyond question that the Bangladeshi confiscation of those rights was contrary both to American public policy and to international law, the Bangladeshi Claimants can prevail only if this Court is prevented by the act of state doctrine from considering the legality and propriety of that confiscation.

As we have demonstrated in our Main Brief on Appeal and in this Supplemental Brief, the act of state

doctrine does not prevent this Court from examining the confiscation in the light of American public policy and the requirements of international law. Whether the confiscation is viewed as a seizure of the right to receive payment of the proceeds of the sale of the jute from Golodetz or as a seizure of title to the jute, it seems clear that Bangladesh did not consummate its taking within its own territory and that there could be no fait accompli without the intervention of the courts of another jurisdiction--the courts of the United States, where the proceeds of the sale of the jute and the person (Golodetz) obligated to pay such proceeds were located. Moreover, if this case is viewed as involving a taking of the jute itself, it falls within the Hickenlooper Amendment and this Court is required to test the confiscatory action of Bangladesh by the standards of international law.

Therefore, on the basis of all the arguments which we have presented to this Court, it is respectfully requested that the judgment of the District Court granting Muslim Bank's Motion for Summary Judgment pursuant to Rule

56 of the Federal Rules of Civil Procedure be in all respects affirmed.

Respectfully submitted,

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# ADDENDUM

Exhibit A-1

# ACT XX OF 1975

## ABANDONED PROPERTIES (TAKING OVER AND MANAGEMENT) ACT, 1975

*An Act to provide for the taking over and management of certain properties*

[Gazette of Pakistan, Extraordinary, Part I, 17th February 1975]

The following Act of Parliament received the assent of the President on the 12th February 1975, and is hereby published for general information :—

Whereas it is expedient to provide for the taking over and management of certain properties, and for matters connected therewith ;

And whereas the Proclamation of Emergency referred to in Article 280 of the Constitution is still in force;

It is hereby enacted as follows:—

1. *Short title, extent and commencement.*—(1) This Act may be called the Abandoned Properties (Taking Over and Management) Act, 1975.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

2. *Definitions.*—In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "abandoned property" means any property, movable or immovable (including share in industrial units and firms, investments, deposits, policies of insurance and all other interests and rights in or to or arising out of any such property), belonging to a specified person and includes any such property sold or transferred to, or placed under the supervision or control of, any other person on or after the sixteenth day of December 1971, but does not include any ornaments or wearing apparel or any cooking vessels or other household effects in the immediate possession of a specified person, not exceeding a total of rupees one thousand;

(*b*) "Administrator" means the Administrator appointed under section 5, and includes a Deputy Administrator;

(*c*) "Board" means the Board of Trustees constituted under section 4;

(*d*) "prescribed" means prescribed by rules;

(*e*) "rules" means rules made under this Act;

(*f*) "specified person" means a citizen of Pakistan domiciled in the territories which immediately before the sixteenth day of December 1971, constituted the province of East Pakistan who has left or leaves or has expressed his desire to be taken out of, or to be allowed to leave, the territories of Pakistan and includes a company registered in the said territories the registered office of which has not been shifted in pursuance of the Companies (Shifting of Registered Office) Ordinance, 1972 (V of 1972).

3. *Vesting of abandoned property in Government.*—All abandoned property shall vest and shall be deemed always to have vested in the Federal Government on and from the sixteenth day of December 1971.

4. *Board of Trustees.*—(1) As soon as may be after the commencement of this Act, the Federal Government shall, by notification in the official Gazette, constitute a Board of Trustees consisting of a Chairman and such number of other Trustees as the Federal Government may specify in the notification, for the control and management of abandoned property.

(2) In discharging its functions, the Board shall be guided on questions of policy by the instructions, if any, given to it by the Federal Government which shall be the sole judge as to whether a question is a question of policy.

(3) The meetings of the Board shall be held at such intervals and at such time and place as the Chairman of the Board may determine.

(4) Subject to the rules, the Board may, with the previous approval of the Federal Government and by notification in the official Gazette, make regulations for regulating its procedure.

(5) At any time when the office of Chairman is vacant or the Chairman is absent or is unable to perform the functions of his office due to any other cause, the Federal Government may appoint any member of the Board to act as Chairman until a Chairman is appointed or, as the case may be, the Chairman resumes his functions.

5. *Appointment of Administrator and Deputy Administrators.*—(1) For the purpose of carrying the provisions of this Act into effect, the Federal Government may, by notification in the official Gazette, appoint an Administrator for Pakistan and one or more Deputy Administrators for such areas as may be specified in the notification.

(2) The Administrator shall exercise his powers and perform his functions subject to the general supervision and control of the Board and shall be guided by any general or special order made by the Board.

6. *Holding of abandoned property and its surrender, etc.*—(1) Every person who is, or has at any time after the sixteenth day of December 1971, been in possession, supervision or management of any abandoned property shall be deemed to hold or to have held, as the case may be, such property on behalf of the Board.

(2) As soon as may be, but not later than such date as may be notified by the Federal Government in the official Gazette, every person who is, or has at any time after the sixteenth day of December 1971, been in possession, supervision or management of any abandoned property or property which he knows or has reason to believe to be abandoned property, and whose authority or right to hold, occupy, supervise or manage such property has not been accepted or approved by the Administrator, shall submit to the Administrator, or to any person authorised by him in this behalf,—

(*a*) full information relating to such property, including the date since when, or the period for which, he had been in possession, supervison or management thereof; and

(*b*) a detailed account of the rents, profits, income and other moneys received or benefits derived from such property since the sixteenth day of December 1971, or for the period he has been in possession, supervision or management thereof.

(3) Every person as aforesaid shall, as soon as may be, but not later than such date as may be notified by the Federal Government in the official Gazette, intimate to be Administrator in writing his willingness to surrender such property to the Administrator or to any person authorised by the Administrator in this behalf, and shall surrender the same if called upon by the Administrator or any person authorised as aforesaid.

7. *Power of Administrator to take possession of abandoned property.*—If, any person who has purchased any abandoned property the sale of which has not been confirmed by the Administrator under section 13, or who is in possession, supervision or management of any abandoned property or property which he knows or has reason to believe to be abandoned property does not surrender such property to the Administrator or the person authorised by him in this behalf, then, without prejudice to any other action or penalty to which such person may otherwise be liable, the Administrator may use such force as is necessary for taking possession of such property and may for this purpose, after giving reasonable warning and facility to any woman not appearing in public to withdraw, remove or break open any lock, bolt or door, or do any other act necessary for the said purpose.

8. *Payment to Administrator.*—(1) Any amount due to a specified person or payable in respect of any abandoned property or property of which the Administrator has taken possession shall be paid to the Administrator by the person liable to pay the same.

(2) Any person who makes a payment under subsection (1) shall be discharged from further liability to pay to the extent of the payment made.

9. *Recovery of damages for unauthorised possession.*—Any person who has been in possession or occupation of abandoned property in an unauthorised manner or is found to have misappropriated or unlawfully converted abandoned property to his own use or caused loss to it by his act or omission shall, without prejudice to any other action or penalty to which he may otherwise be liable, pay such damages as may be assessed by the Administrator:

Provided that no such damages shall be assessed by the Administrator without giving notice to such person and affording him an opportunity of being heard.

10. *Exemption from legal process.*—(1) Property which has vested in the Federal Government or of which possession has been taken by the Administrator shall be exempted from all legal process, including seizure, distress, ejectment, attachment or sale by any officer of a Court or any other authority, and no injunction or other order of whatever kind in respect of such property shall be granted or made by any Court or any other authority, and the Federal Government shall not be divested and the Administrator shall not be dispossessed of such property by operation of any law for the time being in force.

(2) Upon the commencement of this Act, any such legal process as aforesaid subsisting immediately before such commencement shall cease to have

effect and all abandoned property in custody of any Court, or receiver, guardian or other officer or person appointed by it, shall, upon delivery of the same being called for by the Administrator, be delivered to the Administrator.

11. *Publication of list of abandoned property.*—The Administrator shall publish, by notification in the official Gazette, a list of abandoned property in any area,

12. *Prohibition of tranfers of property generally.*—The Federal Government may, by notification in the official Gazette, declare that in such area with a view to preventing the unauthorised or surreptitious transfer of abandoned properties in any area in which a considerable number of such properties is believed to be situated, for such period as may be specified in the notification, the transfer of any property or class of property, or the creation of any right or interest therein or encumbrance thereon, shall be prohibited, and where any such declaration has been made, no such transfer or creation shall be made during that period in that area except with the previous approval in writing of the Administrator.

13. *Confirmation of transfer by specified persons.*—(1) No creation or transfer of any right or interest in or encumbrance upon any property made in any manner whatsoever on or after the sixteenth day of December 1971, by or on behalf of a specified person shall be effective so as to confer any right or remedy on any party thereto or on any person claiming under any such party, unless it is confirmed by the Administrator.

(2) An application for confirmation of such creation of any right or encumbrance or transfer as aforesaid as may be made to the Administrator within the prescribed period by any party thereto, or by any person claiming under or lawfully authorised by such party.

(3) The Administrator shall hold a summary inquiry into the application in the prescribed manner and may reject the application if he is of opinion that the creation or transfer—

(*i*) was not or has been entered into in good faith or for adequate consideration; or

(*ii*) ought for any other reason not to be confirmed.

(4) If the application is not rejected under subsection (3), the Administrator may, with the prior approval of the Board, confirm the creation or transfer either unconditionally or subject to such terms and conditions as he thinks fit to impose.

14. *Claims by interested persons.*—(1) Any person claiming any right or interest in any property treated by the Administrator as abandoned property may prefer a claim to the Administrator on the ground that—

(*a*) the property is not abandoned property ; or

(*b*) his interest in the property has not been affected by the provisions of this Act.

(2) An application under subsection (1) shall be made within the prescribed period being a period of not less than thirty days from the prescribed date.

(3) On receiving an application under subsection (2), the Administrator shall hold a summary inquiry in the prescribed manner and, after taking such evidence as may be produced, shall pass an order stating the reasons therefor, rejecting the application or allowing it wholly or in part on such terms and conditions as he thinks fit to impose.

15. *Appeal and revision.*—(1) Any person aggrieved by an order or decision of the Administrator may, within the prescribed period, which shall not be less than twenty-one days, prefer an appeal to the Board.

(2) The Board may, after giving the appellant an opportunity of being heard, pass such order as it thinks fit.

(3) The Board may, at any time, either of its own motion or on the application of any person made within the prescribed period, call for the record of any proceeding under this Act which is pending before, or has been disposed of by the Administrator, for the purpose of satisfying itself as to the legality or propriety of any order passed in the said proceeding and may after perusal of the record pass such order in relation thereto as it thinks fit :

Provided that the Board shall not, under this subsection, pass an order revising or modifying an order affecting any person without giving such person an opportunity of being heard.

(4) An order of the Board in an appeal or revision shall be final.

16. *Powers and duties of the Administrator generally.*—(1) The Administrator may take such measures as he considers necessary or expedient for the purpose of securing, administering and managing any abandoned property or property of which possession has been taken by him and may, for any such purpose as aforesaid, do all acts and incur all expenses necessary or incidental thereto.

(2) Without prejudice to the generality of the provisions contained in subsection (1), the Administrator may—

(*a*) carry on the business or undertaking of a specified person ;

(*b*) enter or authorise any person to enter on any land or premises to inspect any abandoned property ;

(*c*) take all such measures as may be necessary to keep any abandoned property in good repair ;

(*d*) direct any person, notwithstanding anything contained in any other law for the time being in force relating to the disclosure of any information by a public servant or any other person, to furnish such return, accounts or other information in relation to any property and to produce such documents as the Administrator considers necessary for the discharge of his duties under this Act ;

(*e*) search, or authorise any other person to search, any building or place in which the Administrator has reason to believe that any abandoned property or any document tending to show that any person is a specified person or that any property is abandoned property is being kept or concealed and take possession thereof ;

(*f*) determine the rent to be recovered from a person found in unauthorised occupation of abandoned property for the period of such occupation ;

(*g*) create a charge on abandoned property ;

(*h*) incur or allow any expenditure to be incurred in the prescribed manner including the payment of taxes, duties, cesses and rates to the Government or to any local authority or of any debt due by a specified person or any claim against him after satisfying himself as to the genuineness of such due or claim ;

(*i*) demolish or dismantle any abandoned property which in the opinion of the Administrator cannot be repaired ;

(*j*) evict with such force as may be necessary an unauthorised occupant of abandoned property or an occupant of such property to whom it has been let out by or on behalf of the Administrator and who makes default in paying the rent for such property or otherwise commits a breach of the terms on which it is let out ;

(*k*) invest in any security approved by the Federal Government or in the prescribed manner any money held by him.

(3) The Administrator shall exercise the powers and perform the functions assigned to him by or under this Act under the general supervision and control of the Board.

17. *Evaluation of abandoned property.*—(1) The Administrator may determine the value of any property of which possession has been taken by him or empower any officer to do so.

(2) If it appears to the Board in any case that the value of any property determined under subsection (1) is not proper, it may make necessary enquiry in the matter and pass such orders as it may think proper and the orders so passed shall be final.

18. *Expenditure by Administrator how to be recouped.*—Subject to the provisions of section 14, any expenditure incurred by the Administrator in the exercise of any power conferred by this Act shall, in relation to any abandoned property in respect of which it has been incurred, be a charge on such property and shall have priority over all other charges on the property and such expenditure may be met or recouped by the Administrator out of the income accruing from such property.

19. *Maintenance of accounts by Administrator.*—(1) The Administrator shall maintain a separate account of each abandoned property of which he has taken possession, and shall cause to be made therein entries of all receipts and expenditure in respect thereof.

(2) The account shall be maintained in such form and in such manner as the Federal Government may direct.

(3) The Federal Government shall cause the account to be inspected and audited at such intervals and by such persons as it may, in consultation with the Auditor-General of Pakistan, determine.

20. *Powers of Board and Administrator when holding an inquiry, etc.*—(1) When holding an inquiry or hearing an appeal or revision under this Act, the Administrator, or as the case may be, the Board shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (Act V of 1908), when trying a suit, in respect of the following matters, namely :—

(*a*) enforcing the attendance of any person and examining him on oath or affirmation ;

(*b*) compelling the discovery and production of documents, articles and things ;

(*c*) issuing a commission for the examination of witnesses ;

(*d*) any prescribed matter.

(2) Every proceeding before the Administrator or the Board under this Act shall be deemed to be judicial proceeding within the meaning of sections 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and for the purposes of section 196 of that Code, the Administrator or the Board shall be deemed to be a Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

21. *Recovery of arrears.*—When any person is in default in making payment of any amount payable to the Administrator under this Act or in pursuance of any rule, regulation or agreement made or entered into thereunder, the Administrator may, in accordance with the rules recover the amount by one or more of the following modes, namely :—

(*a*) attachment and sale, or sale without attachment, of any movable and immovable property of such person ; and

(*b*) appointment of a receiver for the management of the movable and immovable properties of such person.

22. *Penalty and procedure.*—(1) Any person who—

(*a*) contravenes, or resists or interferes with the enforcement of the provisions of this Act or any rule or order made thereunder ; or

(*b*) in an application or in any proceedings under this Act, furnishes or abets the furnishing of any information which he knows or has reason to believe to be false, or fraudulently conceals or misrepresents facts, or abets such concealment or misrepresentation,

shall be punishable with rigorous imprisonment for a term which may extend to three years, or with fine or with both.

(2) No Court shall take cognizance of any offence punishable under this Act save upon a complaint in writing made by an officer appointed under this Act and authorised by the Board in this behalf.

23. *Bar of jurisdiction.*—No Court shall grant any injunction or make any order, nor shall any Court entertain any proceeding, in relation to anything done under this Act.

24. *Indemnity.*—No suit, prosecution or other legal proceeding shall lie against the Federal Government, the Board, the Administrator, a Deputy Administrator or any other person for anything in good faith done or intended to be done under this Act.

25. *Delegation of powers.*—The Federal Government may, by notification in the official Gazette, direct that all or any of its powers under this Act shall, subject to such conditions, if any, as may be specified in the notification, be exercised also by such officer or authority as may be so specified.

26. *Officers and servants.*—The Board may appoint or employ such officers and servants as it considers necessary for the efficient performance of its functions, on such terms and conditions as it may determine.

27. *Act to override other laws.*—The provisions of this Act or any order or rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law and nothing contained in any law relating to the determination of the rent of any immovable property shall apply to any abandoned property.

28. *Power to exempt.*—The Federal Government may by notification in the official Gazette, exempt any person or class of persons or any property or class of property from the operation of all or any of the provisions of this Act.

29. *Power of Federal Government to take action with regard to abandoned property.*—Federal Government may, for the purpose of regulating the

administration of any abandoned property, make such orders or direct such action to be taken in relation thereto as in its opinion the circumstances of the case require and as is not inconsistent with any of the provisions of this Act.

30. *Power to make rules.*—(1) The Federal Government may, by notification in the official Gazette, make such rules as appear to it to be necessary for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(*a*) the terms and conditions of service of the Administrator and Deputy Administrators ;

(*b*) the functions to be performed by the Administrator and the Deputy Administrators ;

(*c*) the manner in which entry or search under clause (*b*) or clause (*e*) of subsection (2) of section 16 may be made or possession of any abandoned property may be taken by the Administrator ;

(*d*) the manner in which inquiries under this Act may be held ;

(*e*) the time within which application for confirmation under section 13 or preferring claim under section 14 may be made ;

(*f*) the income-tax authority who may issue a no-objection certificate under section 13 ;

(*g*) the powers vested in a civil Court which may be exercised by the Administrator when holding any inquiry under this Act ;

(*h*) the fees payable to the Administrator for the administration of abandoned property ; and

(*i*) the delegation of powers and functions of the Administrator to a Deputy Administrator or any other officer appointed under this Act.

31. *Removal of difficulties.*—If any difficulty arises in giving effect to any provisions of this Act, within three months after the commencement of this Act, the Federal Government may make such order, not inconsistent with the provisions of this Act, as it considers necessary or expedient for the purpose of removing that difficulty.

Exhibit A-2

# ACT XLV OF 1976

# ABANDONED PROPERTIES (TAKING OVER AND MANAGEMENT) (AMENDMENT) ACT, 1976

*An Act to amend the Abandoned Properties (Taking Over and Management) Act, 1975*

[Gazette of Pakistan, Extraordinary, Part I, 15th June 1976]

The following Act of Parliament received the assent of the President on the 4th June 1976, and is hereby published for general information :—

Whereas it is expedient to amend the Abandoned Properties (Taking Over and Management) Act, 1975 (XX of 1975), for the purposes herinafter appearing;

And whereas the Proclamation of Emergency referred to in Article 280 of the Constitution of the Islamic Republic of Pakistan is in force;

It is hereby enacted as follows :—

1. *Short title and commencement.*—(1) This Act may be called the Abandoned Properties (Taking Over and Management) (Amendment) Act, 1976.

(2) It shall come into force at once and shall be deemed to have taken effect on the twelfth day of February 1975.

2. *Amendment of long title and preamble, Act XX of 1975.*—In the Abandoned Properties (Taking Over and Management) Act, 1975 (XX of 1975), hereinafter referred as the said Act, in the long title and preamble, the words "taking over and" shall be omitted.

3. *Amendment of section 1, Act XX of 1975.*—In the said Act, in section 1, in subsection (1), the words "Taking Over and" shall be omitted.

4. *Amendment of section 2, Act XX of 1975.*—In the said Act, in section 2, for clause (*f*) the following shall be substituted, namely :—

"(*f*) 'specified person' means a person who, at any time before the sixteenth day of December 1971, was a citizen of Pakistan domiciled in the territories which before the said day constituted the Province of East Pakistan and who, on or after that day, has ceased or ceases to be a citizen of Pakistan, and includes a company registered in the said territories the registered office of which has not been shifted in pursuance of the Companies (Shifting of Registered Office) Ordinance, 1972 (V of 1972)."

5. *Amendment of section 21, Act XX of 1975.*—In the said Act, in section 21, after the word "amount" occurring for the second time, the commas and words ", alongwith interest thereon at such rate as the Federal Government may, by notification in the official Gazette, specify," shall be inserted.

6. *Amendment of section 29, Act XX of 1975.*—In the said Act, in section 29, after the word "administration", the commas and words ", or disposal in the public interest, by way of tranfer or otherwise," shall be inserted.

7. *Repeal.*—The Abandoned Properties (Taking Over and Management) (Amendment) Ordinance, 1976 (XVII of 1976), is hereby repealed.

Exhibit A-3

HICKENLOOPER AMENDMENT, 22 U.S.C. § 2370(e)

"(1) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962--

(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(B) has taken steps to repudiate or nullify existing contracts or agreements with any United States citizen or any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(C) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned,

and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and the provisions of this subsection shall not be waived with respect to any country unless the President determines and certifies that such a waiver is important to the national interests of the United States. Such certification shall be reported immediately to Congress.

Upon request of the President (within seventy days after such action referred to in subparagraphs (A), (B), or (C) of this paragraph), the Foreign Claims Settlement

Commission of the United States (established pursuant to Reorganization Plan No. 1 of 1954, 68 Stat. 1279) is hereby authorized to evaluate expropriated property, determining the full value of any property nationalized, expropriated, or seized, or subjected to discriminatory or other actions as aforesaid, for purposes of this subsection and to render an advisory report to the President within ninety days after such request. Unless authorized by the President, the Commission shall not publish its advisory report except to the citizen or entity owning such property. There is hereby authorized to be appropriated such amount, to remain available until expended, as may be necessary from time to time to enable the Commission to carry out expeditiously its functions under this subsection.

(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including

the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking. or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."